

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. CV 10-1263 JP/WPL
CR 08-2436 JP

MATTHEW MOWERY,

Defendant.

MEMORANDUM OPINION AND ORDER

This post-conviction matter is before the Court on remand from the Court of Appeals for the Tenth Circuit. The remand order (CV Doc. 29) directs this Court to consider whether Defendant's "notice of appeal should be construed as a motion to reopen the time to file an appeal, and if so, whether such relief is warranted under the circumstances." The notice (CV Doc. 26; CR Doc. 79) initiated Defendant's appeal of this Court's order (CV Doc. 22; CR Doc. 75) that dismissed his Motion to Alter or Amend Judgment Under Fed.R.Civ.P. 59(e) (CV Doc. 18; CR Doc. 71).

Defendant was represented by counsel in his § 2255 proceeding and subsequent appeal. After the Court of Appeals dismissed his appeal (CV Doc. 23; CR Doc. 76) from the denial of his § 2255 motion, Defendant filed a pro se motion under rule 60(b). After the Court dismissed that motion, he filed a rule 59(e) motion (CV Doc. 18; CR Doc. 71). When Defendant began proceeding pro se, the Court's docket was not corrected to reflect his pro se status or indicate his current address. As a result, notice of the February 4, 2014, order (CV Doc. 22; CR Doc. 75) dismissing Defendant's rule 59(e) motion was sent only to his former counsel. He alleges in his notice of appeal that he did not receive notice of the order until the Court of Appeals entered its

order denying his petition for writ of mandamus on July 3, 2014. He then filed his notice of appeal on July 11, 2014.

The terms of Fed. R. App. P. 4(a)(6) allow a district court to reopen the time for appeal in certain circumstances.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

- (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
- (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
- (C) the court finds that no party would be prejudiced.

Here, the Court finds that Defendant did not receive notice of the order dismissing his rule 59(e) motion before July 3, 2014, long after the 21-day period in appellate rule 4(a)(6)(A). Defendant filed his notice of appeal on July 11, 2014, well within either the 14-day or the 180-day limit in rule 4(a)(6)(B). The Court finds that no party would be prejudiced by the late appeal. The Court also notes that Defendant had attempted to preserve his appellate rights when he filed his Prospective Notice of Appeal (CV Doc. 20; CR Doc. 73) on January 27, 2014.

The Court finds that reopening the time for appeal is “warranted under the circumstances.” The Court will construe Defendant’s notice of appeal as a motion to reopen the time to file an appeal and will grant the motion. The applicable rule allows Plaintiff 14 days from entry of this order to file a notice of appeal. *See IME Administrators v. Colorado*, 146 F. App’x 281, 284 (10th Cir. 2005) (“Because the appeal was correctly dismissed, . . . [Defendant] was required to file a new, timely notice of appeal.”)

IT IS THEREFORE ORDERED that Defendant’s Notice of Appeal (CV Doc. 26; CR Doc.

79) filed on July 11, 2014, is construed as a motion to reopen time to file an appeal under Fed. R. App. P. 4(a)(6) and is GRANTED; and, within fourteen (14) days from entry of this Order, Defendant may file his timely notice of appeal from the order (CV Doc. 22; CR Doc. 75) that dismissed his rule 59(e) motion.

A handwritten signature in black ink, reading "James A. Parker". The signature is written in a cursive style with a large, prominent loop at the end of the last name.